

Date: October 18, 1996

Case No.: 95-TSC-4

In the Matter of

RICHARDO ACORD,
Complainant

v.

ALYESKA PIPELINE SERVICE CO.,
Respondent

and

ARCTIC SLOPE INSPECTION
SERVICES, INC.,
Respondent

Appearances:

Thad Guyer, Esq.
Alene Anderson, Esq.
Thomas Carpenter, Esq.
Dana Gold, Esq.
For the Complainant

Robert Jordan, Esq.
Morgan Hodgson, Esq.
Kenneth Miller, Esq.
Lawrence Trotter, Esq.
For the Respondent
Alyeska Pipeline Service Company

Greg Youngmun, Esq.
David Floerchinger, Esq.
For the Respondent
Arctic Slope Inspection Services, Inc.

Before: THOMAS M. BURKE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the employee protection provisions of the Toxic Substances Control Act, 15 U.S.C. § 2601, the Water Pollution Control Act, 33 U.S.C. § 1367, the Solid Waste Disposal Act, 42 U.S.C. § 6971, and the Clean Air Act, 42 U.S.C. § 7622 (referred to collectively as "Acts") and the regulations promulgated thereunder at 29 C.F.R. Part 24. These

provisions protect employees against discharge or other discrimination for attempting to carry out the purposes of these Federal statutory provisions. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of the purpose of these statutory provisions.

This proceeding involves a complaint filed on December 6, 1993 by complainant, Richardo Acord, against Respondent Alyeska Pipeline Service Company ("Alyeska") alleging that Alyeska discriminated against him in violation of the Acts by engaging in harassment and intimidation because he voiced and reported safety and environmental concerns.

The complaint was investigated by the District Director of the Seattle, Washington regional office of the Wage and Hour Division of the United States Department of Labor. The District Director notified Alyeska by letter dated October 21, 1994 that the complainant was a protected employee engaging in a protected activity within the scope of the Acts and that discrimination as defined by the Acts was a factor in the actions which comprised his complaint.

Alyeska filed an appeal with the Office of Administrative Law Judges on October 26, 1994. Complainant also filed an appeal, on the grounds that the remedies afforded him were inadequate and incomplete, and that the Wage and Hour Division did not investigate the liability of his contract employer named in his complaint, respondent Arctic Slope Inspection Services ("ASIS"). On June 5, 1995, pursuant to an order of the undersigned Administrative Law Judge, complainant filed an amended complaint adding respondent ASIS to this matter.

A hearing was held in Anchorage, Alaska from November 6 through November 13, 1995. Post-hearing briefs were received on February 7, 1996 and reply briefs were received on February 24, 1996. Alyeska filed a Motion For Leave To File Surreply Brief On Jurisdiction on March 19, 1993. Alyeska's motion for leave to file is hereby granted.

MOTION TO STRIKE

Respondent Alyeska filed a Motion To Strike Non-Record Materials on February 15, 1993. Respondent ASIS joined in the motion by filing dated February 22, 1996. Complainant responded to the motion to strike on February 21, 1996.

Alyeska moves to strike two elements from complainant's brief: 1) portions of the brief that cite or discuss exhibits that have not been admitted into evidence; and, 2) all references

to an "Addendum" attached by complainant to his post-hearing brief.

Alyeska moves to strike citations and quotes in complainant's post-hearing brief to exhibits which were never admitted into evidence. Complainant agrees that three citations to ASISX 71 referenced by Alyeska's motion should be stricken as they were a result of oversight in preparing a list of admitted exhibits, and that complainant's string cite to CX 95; CX 102; CX 119; CX 161 was the result of an unintentional typographical error. The citation should have referred to Alyeska Exhibits. Complainant requests that he be allowed to amend the typographical error at page 40 of his post-hearing brief to reference Alyeska exhibits instead of complainant's exhibits, that is, ALYX 95; ALYX 102; ALYX 119; ALYX 161. Complainant's request to amend page 40 of his post-hearing brief is granted.

Alyeska moves that the "Addendum" attached to complainant's post-hearing brief be stricken because it was never offered into evidence during the hearing, and because it is inadmissible hearsay. The Addendum purports to be 153 pages of a transcript of hearings conducted before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce in July and November 1993. Complainant agrees that he did not offer the document into evidence during the hearing but argues that it can be considered nonetheless under 29 C.F.R. § 18.201(d) which provides that the Administrative Law Judge shall take official notice if requested by a party and supplied with the necessary information. Complainant frames the adjudicative fact he wishes to be noticed as: "that in July and November 1993, the Congressional Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce held hearings regarding Alyeska Pipeline Service Company's environmental record and treatment of quality control inspectors, and that Alyeska management participated in those hearings." Complainant also responds that consideration of the document is not precluded by the hearsay rule because it is not being offered to show the truth of the matters stated therein. See 29 C.F.R. § 18.801(c).

Alyeska's motion to strike the "Addendum" is granted for reason that it was never offered into evidence during the hearing. Its admission into evidence at this time, after the closing of the record would be contrary to 29 C.F.R. §§ 18.54(a) and 24.5(e)(2). Section 18.54(a) provides that no additional evidence shall be accepted after close of the record except upon a showing that new and material evidence has become available which was readily available prior to the closing of the hearing. Section 24.5(e)(2) provides that all evidence upon which the Administrative Law Judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference.

Complainant's request that judicial notice be taken under

§ 18.201(d) of the adjudicative fact for which the addendum was offered is granted. Judicial notice is taken that:

In July and November 1993, the Congressional Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce held hearings regarding Alyeska Pipeline Service Company's environmental record and treatment of quality control inspectors, and that Alyeska management participated in those hearings.

FINDINGS OF FACT

Complainant, Richardo Acord, a Quality Control Specialist, first began employment with Alyeska through a job shop contractor named Sonic System in 1991, and was "rolled over" to contractor Ocean Technologies, Inc. in June of 1992. When ASIS assumed the inspection contract for Alyeska in July 1993, complainant was "rolled over" to work with ASIS. A "rollover" is a direct transfer of employees from one contractor to another contractor without any provisions for layoff and rehiring. (Tr. 94-95)

Respondent Alyeska is a corporate entity whose mission is to design, construct, operate and maintain the Trans-Alaska Pipeline System. Alyeska is a joint venture company owned primarily by BP Pipelines Inc., ARCO Transportation Alaska, Inc., and Exxon Pipeline Company. The Trans-Alaska Pipeline runs 800 miles from Prudhoe Bay to Valdez, crossing three mountain ranges, 800 water ways including 34 major rivers and streams. (Joint Ex. 1 at p. 1)

Respondent ASIS is an inspection contractor wholly owned by Arctic Slope Consulting Group ("ASCG"), which in turn is wholly owned by Arctic Slope Regional Corporation ("ASRC"). (Tr. 1477-79) ASIS began providing services to Alyeska effective June 14, 1993. During 1994, ASIS' contract for inspection services with Alyeska constituted at least 95 per cent of ASIS' total business, and generated five to eight million dollars of revenue. When ASIS assumed the inspection contract with Alyeska in 1993, ASIS was working toward achieving alliance contractor status with Alyeska, which would provide ASIS with a secure expectation of future contracts and a long term relationship with Alyeska. (Tr. 1496-1497)

Complainant has been in the quality control inspection profession since 1988. He has certifications as a welding inspector, for the uniform plumbing code, uniform building code, uniform mechanical code as well as various International Conference of Building Officials Codes. He worked for three years with the engineering test and evaluation laboratories of McDonald Douglas at Long Beach, California. He subsequently worked for Inspection Services and Testing in Fairbanks, Alaska doing inspection and testing. Next, Complainant worked for Sonic

Systems International ("SSI") where he performed inspection testing and evaluation of welded structures and pipeline.

During 1991 through 1993 complainant worked as a contract employee to Alyeska on Alyeska pipeline projects and the marine terminal. The contractors he was employed by include SSI, Ocean Technology and ASIS. (Tr. 416-19) After complainant's employment with ASIS on the Alyeska pipeline was terminated, complainant was hired by Houston Contracting during the second or third week of February, 1994 to work at Prudhoe Bay, Alaska. He left Houston Contracting upon the completion of the job at the end of April, 1994 and started with VECO International in Prudhoe Bay. He left VECO on June 10, 1994 because of a medical condition. He testified that he was directed out of Prudhoe Bay by an ARCO Doctor. He subsequently worked at American Mechanical at Eilson Air Force Base until the end of April, 1995. Complainant left work with American Mechanical to prepare for the hearing in this case. Complainant also worked a short duration with Alaska Trailer. Complainant was unemployed at the time of the hearing.

Complainant's employment with Ocean Technology started in June of 1992. His duties included inspections on the trans-Alaska Pipeline and the Valdez marine terminal. (Tr. 418-19) In February of 1993 complainant was transferred to Anchorage to work in the quality services department at the Alyeska corporate headquarters. Projects he worked on included the periodic inspection program and special programs encompassing a wide range of equipment on the pipeline, particularly mobile cargo tanks ("MCTs").

Complainant voiced concerns about the safety of a pipe line crossing to Ocean Technology and Alyeska representatives in 1992 and again in July of 1993. Complainant observed vertical movement of a parcel of the trans-Alaska pipeline as a result of a 60,000 pound rig becoming mired while crossing the pipeline. (Tr. 546)

Complainant raised concerns about inspectors receiving adequate training or assistance in the MCT inspection program in 1992 and 1993. He also had concerns about problems of corrosion stress cracking on some of the tankers that carried toxic substances, and that oil spill contingency equipment was lacking timely inspections. (Tr. 424-28) He expressed his concerns to Alyeska quality services. Complainant also raised concerns about the qualifications of inspectors who worked for a company named Silver's Inspection Services from Texas and that past inspections performed by Silver inspectors failed to note numerous problems. (Tr. 429) Complainant also reported to Alyeska that an inspection report of an oil equipment back truck showing a need for minor repairs did not reflect the actual condition of the tanker. (Tr. 430)

Complainant went on sick leave from August 20, 1993 until October 21, 1993 because of asthma and serious lung infections. (Tr. 461, 468, 741) He was relieved of inspection activities but his respiratory difficulties did not preclude him from doing other work such as completing his paperwork. He was laid off by ASIS effective October 29, 1993. Respondents assert that the lay off was because of a seasonal lack of work. (Tr. 347) The only inspection work available was inspection of MCTs, and complainant had informed Swink that he no longer wished to do inspection work that involved going inside MCTs because of his respiratory problems. (Tr. 467-468, 890) When ASIS laid off complainant its expectations were that he would be recalled when work became available. (Tr. 1612-13, 749-51; ASISX 45)

Complainant's employment was terminated by ASIS on December 10, 1993. Marvin Swink, Vice President and General Manager of ASIS, was the official responsible for the firing. (Tr. 765-66) ASIS' reason for terminating complainant's employment was that he failed to do his job.

JURISDICTION

Complainant files this complaint under four federal environmental protection statutes, each of which provides specified whistleblower protections: the Clean Air Act, the Federal Water Pollution Control Act, the Solid Waste Disposal Act and the Toxic Substances Control Act. Alyeska argues that the allegations of protected activity in complainant's complaint do not establish jurisdiction under any one of the four statutes. Alyeska contends that complainant has not shown a nexus between the activities for which he claims to have suffered illegal retaliation and the substantive provisions of the statutes on which he relies.

The protected activity alleged by complainant consists of internal complaints to Alyeska and ASIS management about five concerns he had regarding Alyeska's operations, all of which had the potential of causing environmental degradation. Those complaints involve:

- 1) possible harm to the trans-Alaska pipeline by a 60,000 pound drill rig becoming stranded in the mud while crossing over the pipeline at an animal crossing site in the immediate proximity to a stream, and causing actual physical movement of the pipeline which was carrying oil under pressure; (ALJX 1)

- 2) construction debris buried at mile post 113; (ALJX 1)

- 3) concern that Silver Inspection Services, a company contracted to do inspections of MCTS for Alyeska was unqualified, or had not performed well in the past; in particular that Silver

had overlooked base metal and weld defects during inspections in the past; (Tr. 429)

4) concerns that a fleet of tankers to be used in the event of an oil spill or other emergency had not been inspected for as many as 15 years; (Tr. 425)

5) concern that MCTs which carried Drag Reducing Agent, thought to be a toxic substance by complainant, suffered from corrosion stress cracking which could cause complete failure of the whole tank while it was on the road, being unloaded or offloaded. (Tr. 424-25)

Alyeska argues that complainant has not established jurisdiction because he does not attempt to link his concerns with the Acts, does not cite to any permit under the Acts that might be implicated, does not identify any substance regulated by the Toxic Substance Control Act, or claim a violation of any rule or regulation under the Acts.

Alyeska places too restrictive an interpretation on the activities protected by the environmental statutes. Complainant does not have to quote regulatory sections violated or permits breached. The Secretary has held that the employee protection provisions have traditionally been construed broadly. An activity is protected if it is in furtherance of the statutory objectives. Jenkins v. U.S. Environmental Protection Agency, Case No. 92-CAA-6 (Sec'y, May 18, 1994). The Secretary in Minard v. Nerco DeLamar Co., Case No. 92-SWD-1 (Sec'y, Jan. 25, 1994) held that the actions of the complainant should be subject to a reasonableness test. Specifically, the Secretary found that the activity of a complainant based on a reasonable belief that a substance is hazardous and subject to EPA regulation is protected by the Solid Waste Disposal Act. In Monteer v. Casey's General Stores, Inc., Case No. 88-SWD-1 (Sec'y, Feb. 27, 1991) a complainant's internal complaints and expressed suspicions about a gasoline odor and leak was held to constitute protected conduct within the scope of the SWDA. See also Crosby v. Hughes Aircraft Company, Case No. 85-TSC-2 (Sec'y, Aug. 17, 1993).

All of complainant's activities concern the potential violation of the named environmental protection statutes. Inadequate or improper inspections which do not reveal weld defects in the MCTs that transport toxic substances can reasonably be considered a threat to the Nation's waterways and consequently a violation of the Water Pollution Control Act. James Kingrea, who is responsible for Alyeska's periodic inspection programs, testified that the MCTs haul hazardous or flammable type materials, and that inspections of them are important to guarantee a certain level of safety to people, equipment and the environment. (Tr. 1390, 1374-76) Ignoring damage to the integrity of the trans-Alaska pipeline could

reasonably be considered as endangering Alaskan waters. The unpermitted burial of construction wastes at mile post 113 could reasonably be considered a violation of the Solid Waste Disposal Act. It is true that the primary mechanism under the Water Pollution Control Act for regulating the discharge of pollutants is a nationwide permit program. However, the Act does prohibit the discharge of any pollutant into the waters of the United States except by permit. 33 U.S.C.A. § 1311.

Accordingly an employee's complaint about an action or inaction of his employer which he reasonably believes is violative of the environmental protection statutes because it jeopardizes clean water, clean air or solid waste management, is protected activity. Here, complainant's concerns as a quality control inspector about the aforesaid actions of Alyeska constitute protected activity as they could reasonably be perceived as violations of the environmental protection acts. The Department of Labor has jurisdiction over his claims.

EMPLOYEE-EMPLOYER RELATIONSHIP

Alyeska argues that it has no responsibility here because it ceased being an employer of the complainant and ceased being responsible for any actions taken toward complainant for a period significantly longer than the thirty day period of limitations.

Complainant began employment with Alyeska on the trans-Alaska pipeline as a quality control inspector in 1991. His employer was SSI, an employment service company that supplied quality control inspectors to Alyeska. The services of inspectors including complainant were supplied by SSI to Alyeska through the "body shop" contract arrangement. In the body shop arrangement the inspectors worked largely at the direction of Alyeska supervisors. (Tr. 1116-17) In June of 1992 Complainant continued to be employed with Alyeska but his employment was rolled over to contractor Ocean Technologies, Inc. A roll over is a transfer of employees from one contractor to another without any provisions for rehiring. When ASIS assumed the inspection contract for Alyeska in July 1993, complainant was rolled over from Ocean Technologies, Inc. to work with ASIS¹. (Tr. 416-419)

Beginning in 1992, Alyeska changed its relationship with its employment service companies. It moved from body shop arrangements where the contractors supplied employees who worked under Alyeska supervision to a contract where the contractors provided services and the supervision of those services. (Tr. 1116) In the case of quality control inspectors, the change occurred in July, 1993 with the combining of the contracts of ASIS and Ocean Technologies into one contract under ASIS and the

¹ASIS and Ocean Technologies, Inc. were owned by the same parent company, Arctic Slope Consulting Group.

execution of a full service contract between Alyeska and ASIS. (Tr. 714, 1116-19) Two of the principal reasons for the service contract arrangement according to Alyeska President, David Prichard, was to have the contractors manage and be accountable for their own activities and therefore do a better job, and secondly to avoid co-employment exposure through supervising employees on day to day jobs. (Tr. 133, 134)

Larry Blachut, supervisor of inspections for Alyeska, testified that he stopped giving complainant any direction sometime in mid-August, 1993. (Tr. 1037) Marvin Swink, Vice President and General Manager of ASIS, testified that he was the decision maker with respect to complainant's termination. (Tr. 765) Complainant testified that subsequent to August 20, 1993 he was not receiving directions from Blachut but from Robbie Robertson, the operations manager for ASIS who was in charge of assignments to the inspectors. (Tr. 500-01, 716)

Complainant argues that the "full service" contract failed to achieve Alyeska's purpose because Alyeska maintained control over the complainant's employment. The Secretary of Labor in Palmer v. Western Truck Manpower, Case No. 85-STA-6 (Sec'y, Jan. 16, 1987) listed the following criteria to determine whether two entities are joint employers: 1) inter-relation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership.

The Secretary in Palmer quoted with approval the Administrative Law Judge's reasoning that of the four criterion applied to determine joint employment, the most important is the criterion of interrelation of operations, and that whether a corporation possesses sufficient indicia of control to qualify as a joint employer is essentially a factual issue. The Secretary cited case law for the proposition that "where it has been established that a business entity controlled the work schedules, assigned the work and decided when additional workers were needed, a joint employer relationship has been found." Palmer, supra, at p. 2.

Complainant contends that the contract entered into between Alyeska and ASIS demonstrates that Alyeska has control over ASIS employment decisions. Complainant cites provisions of the contract which detail some prerogatives by Alyeska. Those provisions include terms requiring that: (1) work by ASIS is performed under detailed terms and conditions prescribed by Alyeska through its work orders; (2) ASIS inspectors comply with all applicable Alyeska rules and regulations; Alyeska may refuse contractor employee admission to property under Alyeska control, and on Alyeska's instruction, ASIS shall promptly remove any such employee therefrom; (3) Alyeska shall have access to all personnel employed by contractor; (4) Alyeska will guide and coordinate the work performed by contractor; (5) ASIS will not

approach governmental agencies regarding such contract without Alyeska's prior approval; (6) whenever reasonable and practicable, contractor employees shall use Alyeska provided facilities for lodging and meals; (7) Alyeska proscribes the salary range for each inspector at each salary level and the actual salaries and wages paid to contractor employees shall be reviewed and verified by an Alyeska representative; and (8) ASIS must submit to Alyeska daily timesheets, approved by Alyeska listing dates, hours worked, work location, type of equipment, description of work performed, location of work performed, and completely filled out by the employee.

Alyeska replies convincingly that the aforesaid contract provisions do not relate to control of employment but reflect necessary terms in any service contract. Complainant's argument that the contract provides for control by Alyeska over ASIS is rejected. The contract terms allow Alyeska to specify the work to be done by work orders and allows Alyeska to verify through review of time sheets that the work was performed. The contract provision referred to by complainant as requiring access by Alyeska to ASIS personnel limits the access to purposes of verifying that invoices and payments for work are in accordance with the contract. The clause "for any other reasonable purpose" is set forth under the audit section of the contract and is an attempt to ensure that Alyeska will be able to audit the work. Moreover, the contract contains express language delineating ASIS's responsibility for hiring, managing, firing its employees, assigning, scheduling and supervising their duties; providing tools; and paying benefits. (CX 387, Contract at 1, Art. 1A, Exhibit B (Scope of Work) §§ 1.1.1, 1.1.2, 1.3.5, 1.6, 2.1, 3.1.1) The terms of the contract do not support complainant's argument that there was an interrelationship between Alyeska and ASIS over the employment of quality control inspectors and thus joint employment over complainant.

Complainant also argues that notwithstanding the intent or terms of the contract, the record shows evidence of control by Alyeska over complainant's employment.

Alyeska had control over complainant's employment at least as of July 1, 1993. A letter from Swink, ASIS' General Manager to Steven Newcomer, manager of Alyeska quality control department, characterizes complainant as an Alyeska employee who was under the direct supervision of Alyeska personnel up until about July 1, 1993. (ALYX 161) Notes to file by Blachut, Alyeska supervisor of inspection, show concern for complainant's duties during the month of July, 1993. For example, a July 12, 1993 memo requests information from complainant on the status of his tanker inspections, a July 21, 1993 memo to file references a July 21, 1993 meeting between Blachut and complainant discussing complainant's duties as an inspector, a July 23, 1993 memo discusses Blachut calling complainant into his office to discuss

complainant's late arrival for work and out of character disheveled appearance, and an August 6, 1993 memo refers to a meeting between Swink, Blachut and complainant which had as its purpose establishing complainant's inspection schedule. (ALYX 45, 55, 56, 64; CX 389)

Also, a July 28, 1993 memo to file by William Howitt, President of Human Resources for Alyeska discusses a meeting between complainant, Swink and Alyeska Ombudsman Wood, and notes that complainant wanted a field position. (CX 126) A memo to file by Alyeska Vice President John Dayton dated July 29, 1993 relates to returning complainant back to field inspector, resolving a pay equity issue, discussion of the animal crossing allegation, and a notation that ASIS will continue to watch complainant closely. (CX 410)

Alyeska argues that the aforesaid memos reflect a period of transition where Alyeska was turning the responsibilities for the duties of the inspectors over to ASIS and an attempt to ensure that complainant's assignments did not fall through the cracks. Accepting Alyeska's position that this late summer period was one of transition and it's direction of complainant reflected this transfer of responsibilities does not resolve the matter. At issue is when this transition period ended, if it ever ended during the period of complainant's employment. Alyeska suggests that the transition ended on August 20, 1993. As support, Alyeska points to handwritten instructions dated August 20, 1993 from Swink to complainant attempting to schedule complainant's future MCT inspections. (CX 144) The instructions were written over an August 11, 1993 memo from complainant to Blachut, Robbie Robinson, Swink and Steve Newcomer, in which complainant asked for assistance in prioritizing his future job schedule and completion dates. Although the memo shows Swink and complainant conferring to establish a future schedule, it also reveals confusion on complainant's part about whom he should address his job concerns to, as complainant sent the memo to both ASIS management, Swink and Robinson, and Alyeska management, Blachut and Newcomer.

Complainant's confusion over whom he was to receive direction from is not surprising in light of the testimony of William Biddy, a senior quality specialist for Alyeska, and Swink. Biddy testified that after ASIS received its contract in July, there were numerous problems with who was supervising who and whether Alyeska continued to supervise ASIS employees. (Tr. 55, 56) Swink testified that he had "discussions with Alyeska on many occasions that they were not to be directing the work of our employees." (Tr. 862-3)

After August 23, 1993 there is minimal evidence of Alyeska's direction or supervision of complainant's work. However, there

was little opportunity to do so as complainant was on medical leave and not inspecting tankers from August 20 until October 21, 1993 and he was laid off on October 29. Even so, there was concern expressed by Swink on September 2, 1993 that Alyeska was not keeping him informed of its dealings with complainant. A September 2, 1993 memo by Swink of a meeting he had with Dayton, Alyeska Vice President; Newcomer, Alyeska Quality Manager; and Larry Woods, Alyeska Ombudsman; relates one of the topics discussed:

Discussed situation w/Rick. Informed group that I am not privy to everything going on and it is making it more difficult for me to be consistent w/what I tell Rick. We need to clarify and keep me involved.

(CX 389 at 000052)

The aforesaid notes and memos establish that Alyeska and ASIS were joint employers at all times relevant to complainant's employment. Alyeska continued to direct claimant during the time that he was inspecting tankers and able to be supervised.

Alyeska and ASIS are determined to have been joint employers of complainant.

PRIMA FACIE CASE

To establish a prima facie case in retaliatory adverse action cases arising under the Acts, complainant must show: (1) that he engaged in protected activity; (2) that respondents knew of the protected activity; (3) that he was discharged or otherwise discriminated against with respect to his compensation, conditions, or privileges of employment; and (4) that respondents' discrimination was motivated, at least in part, by his engaging in protected activity. Darty v. Zack Company of Chicago, Case No. 82-ERA-2 (Sec'y, April 25, 1983)

PROTECTED ACTIVITY

The Secretary of Labor has held that internal complaints about possible violations of the Acts should be regarded as protected activities under the Acts. Scerbo v. Consolidated Edison Company, Case No. 89-CAA-2, (Sec'y, Nov. 13, 1992). The Secretary's interpretation has been sustained by six courts of appeal. Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2nd Cir. 1982) (implicit); Passaic Valley Sewerage Commissioners v. Department of Labor, 992 F.2d 474 (3rd Cir. 1991); County v. Dole, 886 F.2d 147 (8th Cir. 1989); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984); Poque v. United States Department of Labor, 940 F.2d 1287, 1289 (9th Cir. 1991); Kansas Gas & Electric Co. v. Brock, 780 F.2d 1505,

1513 (10th Cir. 1985).

The Secretary in Scerbo, supra, regarded an internal complaint as protected activity because it "touched on" public safety and health, the environment, and compliance with the Act.

Complainant made internal complaints to Alyeska and ASIS management about six concerns he had regarding Alyeska's operations:

1) Crossing pipeline at animal crossing 113: Complainant raised concerns in 1991 with John Horey and Terry Casdorph of Alyeska about possible harm to the trans-Alaska pipeline by a 60,000 pound drill rig becoming stranded in the mud while crossing over it at animal crossing 113, and possibly causing actual physical movement of the pipeline which was carrying oil under pressure. (Tr. 422, 546) Complainant testified that he raised the concern again in a note to quality services in 1992, and in July, 1993 to Newcomer, Dayton and Blachut. (Tr. 422, 423) He had also raised the concern to the Alyeska Ombudsman in the fall of 1992.

2) Construction debris buried at mile post 113: Complainant complained to Horey and Casdorph of Alyeska about construction debris being buried at the animal crossing 113 site in 1991 about the same time that he complained about the drill rig crossing. (Tr. 546)

3) Concern over qualifications over inspectors: Complainant testified that he complained that inspectors, including those who worked for Silver, might not be qualified, and that prior inspections by Silver's inspector failed to note numerous repairs. He raised these complaints to Newcomer and Blachut in 1992, during a July 21, 1993 meeting with Blachut, and at a July 28, 1993 meeting with Wood, Newcomer and Swink. (Tr. 428-430, ALYX 55, CX 389 at AAS00044)

4) Concern over inspections of emergency tankers: Complainant complained to Newcomer and Blachut that tankers to be used in the event of an oil spill or other emergency had not been inspected for as many as 15 years. Complainant raised these concerns in 1992 and 1993. (Tr. 425)

5) Concern that MCTs suffered from corrosion stress cracking: Complainant voiced concerns to Newcomer and Blachut that MCTs which carried Drag Reducing Agent, suffered from corrosion stress cracking which could cause complete failure of the whole tank. (Tr. 424-25)

6) Intolerable working conditions: Complainant sent a letter dated August 16, 1993 to Alyeska President Prichard entitled "final resolution" and stating: "I am being subject to

unfair/unequal treatment, unreasonable and intolerable working conditions and ostracized by my superiors and peers because of my perseverance and dedication to inform Alyeska (QSD) of possible Noncompliance problems." (CX 159) Complainant met with Alyeska Vice-President Drayton and Ombudsman Wood at a meeting called by Drayton as a follow up to complainant's August 16, 1993 letter to Prichard. Complainant reiterated his concerns over use of unqualified inspectors, tankers not being inspected or procedures followed. (CX 224)

KNOWLEDGE OF PROTECTED ACTIVITY

Respondents do not contest that they had knowledge of complainant's internal complaints. Alyeska President Prichard, Alyeska Vice Presidents Howitt and Dayton, Alyeska manager Newcomer, Alyeska Quality Control Supervisor Blachut, Alyeska Ombudsman Wood, and ASIS President Swink all at various times knew that complainant had raised concerns regarding the animal crossing incident, the qualifications of inspectors, the adequacy of the mobile cargo tanker inspections and the presence of corrosion stress cracking on some of the tanks. (ALYX 55, CSX 224, CSX 284, CSX 389 at AAS00044; Tr. 221, 223, 225, 422-30, 560, 804-05, 1183)

ADVERSE ACTIONS

Actions Involving Loss of Employment

Complainant was the recipient of two employment actions which resulted in loss of employment. Complainant was laid off by ASIS effective October 29, 1996, and his employment with ASIS was terminated on December 10, 1996.

Actions Involving Harassment and Intimidation

Complainant's complaint to the Department of Labor alleges that he was the subject of continuous harassment and attempted intimidation. Specifically, complainant alleged that his salary was cut twice, promotions and training were denied, that he was ostracized, isolated, demeaned and criticized in the presence of peers, and he was the subject of false allegations of sexual harassment and alcohol/drug abuse. (ALJX 1)

Wages, Promotions and Training

Complainant testified that he was the subject of wage manipulation. (Tr. 477) However, the only incident that complainant referenced as a reduction in manipulation of pay occurred in September, 1992 after his employment was rolled over from SSI to Ocean Tech. Ocean Tech reduced complainant's wage rate from \$20.00 an hour to \$18.00 an hour because the contract between Alyeska and Ocean Tech established new billing rates for

inspectors based on their qualifications and level of certifications. Blachut testified that other inspectors' pay was affected for the same reason. (Tr. 952-55) Complainant's wage rate was set at \$18.00 an hour because he had not yet obtained his certified welding inspector certification as required by the new billing rates. (Tr. 954-55) As soon as complainant obtained his certification, Ocean Tech increased his wage to \$21.00 an hour. The reduction in pay lasted only a week or two. (Tr. 551) Complainant's wage rate was increased to \$26.00 an hour in February, 1993 when he was promoted to Quality Specialist. (Tr. 554-55)

Complainant's complaint about being denied a promotion involved his failure to be promoted to a district inspector position. Blachut testified that complainant along with every other line inspector expressed interest in district inspector positions opening up in early 1993. Blachut testified further that complainant was not as qualified as the inspectors promoted to the positions, in that the level of competition for the positions was extremely high and complainant did not have the broad scope of qualifications required. Specifically, Blachut explained, the district inspector position required an inspector with certifications in multiple disciplines, which complainant lacked. Blachut also testified that there was a concern about complainant's failure to submit his inspection reports on time. (Tr. 885-89)

Complainant asserts that retaliatory action was taken against him at the end of 1992 when he was not invited to a training conference. (Tr. 556) A year-end retreat was held at the end of 1992 by Alyeska for the purpose of problem identification, problem resolution, trying to pull everyone together. It was attended by quality service and operations individuals, as well as some ASIS and Ocean Tech Inspectors. Each of the contractors were to select some individuals to take part. Complainant did not take part. Blachut testified that complainant did not miss out on technical training and that there were a lot of inspectors that did not attend. (Tr. 960-61)

Complainant has not shown that the respondents took adverse action against him with regard to cutting his pay, restricting his training or denying him promotions.

Drill rig crossing concern

Complainant testified that he raised the issue of potential harm to the trans-Alaskan pipeline by the drill rig crossing with a note to quality services in 1992, and in July of 1993 he brought it to the attention of Newcomer. Newcomer testified that complainant brought up the rig crossing incident at a meeting with Ombudsman Wood, Swink, and himself on July 28, 1993. (Tr. 1135) Wood prepared a memo dated July 30, 1993 summarizing

those actions agreed to be undertaken by the participants. The memo states that complainant would provide more information to Newcomer on the rig crossing incident so that the matter could be taken up with engineering. (ALYX 60) Newcomer testified that he did not receive the information from complainant until the following November, at which time he asked Blachut to pursue the matter. Blachut, in turn, involved Chuck Biddy. Newcomer verified that the incident occurred but was not properly documented and investigated. A nonconformance report was issued. The engineering department found no damage to the pipeline after considering such data as curvature and thermal readings. (Tr. 80-83, 1038-39, 1135-35) A response was provided to complainant by Alyeska Vice President Dayton on December 27, 1993.

Complainant testified that he felt threatened by John Horey of Alyeska when he raised his initial concern about the rig crossing in September, 1991. (Tr. 546) However, complainant did not show that he suffered any adverse consequences. He continued to work as an inspector, was subsequently promoted to a higher wage rate, \$21.00 per hour, in 1992, and was promoted to the position of Quality Inspector at \$26.00 per hour in January, 1993. (Tr. 480-81, 551-55, 962-66) Complainant was rolled over to ASIS in July, 1993 with no diminution in pay. (Tr. 418)

In a meeting with LoAnn Larson, human resources manager for ASIS, on July 23, 1993, complainant told Larson that he had been removed from his job on two occasions after writing a non-conformance report. (CX 114, 426) Complainant testified that one of the incidents he was referring to was a transfer to another project in Valdez Marine Terminal after his reporting of the animal crossing problem. The other incident was his removal from the quality specialist job. (Tr. 426-7, 225-26) Complainant did not expound on the circumstances of a transfer at Valdez, and the record is otherwise void of evidence of complainant being transferred from one project to another at Valdez.

The other transfer of job function, complainant's removal from the quality specialist job, could not have been in retaliation because the position was temporary and complainant left it at his own request. Complainant was offered the quality specialist job in February, 1993 by Blachut. In their discussions about the nature of the job, they considered that "the position of quality specialist by nature of its title and the contractual arrangements was a temporary position." (Tr. 966) Complainant lived near Fairbanks and was commuting to Anchorage for the position. Blachut testified that complainant preferred to work out of Fairbanks, and that the expectation was that complainant would be able to return to Fairbanks as soon as they were able to get the program up and running; hopefully mid-year. Swink testified that during one of the meetings held to respond to complainant's list of concerns, complainant requested that he be returned to Fairbanks. (Tr. 732) Swink's notes of the meeting

read that "[Complainant] prefers to not be in Anchorage. Would like to be in Fairbanks and perform inspection on equipment and tanks." (CX 389 at AAS 00044) Newcomer's recollection of the same meeting is that complainant expressed a preference to leave the office environment and go back to Fairbanks; that his residence was there and he felt more comfortable working in the field; and that he requested their help in getting the transfer. (Tr. 1130-31)

Complainant has not shown that he was removed from positions or otherwise retaliated against because of reporting the drill crossing incident or writing any other nonconformance report.

McGrew Incident

Dan McGrew was an outside management consultant hired by Prichard in late May or June of 1993. (Tr. 1668) Sometime in July, 1993, McGrew was told by Prichard that he, McGrew, had been quoted by complainant as saying that Prichard intended to do away with the quality compliance group. McGrew denied making the statement and requested a meeting with complainant. (Tr. 1671-72) The meeting was held on July 20, 1993. It was attended by McGrew, complainant, Swink and Blachut. (Tr. 1673) McGrew became angry at complainant, lost his temper and told complainant, "I'm mad enough to rip your testicles off.." (Tr. 1674-75) Complainant felt physically threatened and left the room. (Tr. 437) The aftermath of the meeting was that McGrew received a reprimand by Newcomer for unprofessional and inappropriate behavior and complainant received apologies from Blachut and, on two occasions, from McGrew. (Tr. 441-42, 616, 1027-28, 1128-29) The meeting with McGrew and his threatening outburst to complainant was not in retaliation for any protected activity by complainant.

Sexual Harassment

The sexual harassment allegation stemmed from an incident that occurred in early 1993 while complainant was an employee of Ocean Tech. Blachut testified that Newcomer's secretary complained that she wanted the complainant to desist from asking her out but didn't know how to tell him. Blachut, as complainant's immediate supervisor was asked to speak to complainant. Blachut called the complainant into his office and explained the secretary's quandary. Blachut recalled complainant responding that he possibly misunderstood the secretary's reaction and he would no longer ask her out. Blachut denied accusing the complainant of sexual harassment. The matter was not documented, and no entry was made in complainant's personnel file. (Tr. 1032-34) The matter was not a retaliatory action.

Prescription drugs

On the morning of July 23, 1993, complainant appeared to Blachut to be behaving in an unusual manner as his clothing was disheveled, his demeanor was out of character, and he was slurring words. Blachut asked complainant if was taking prescription medication, as he knew complainant had a doctor's appointment that afternoon. He cautioned complainant to be careful if he was taking the medication, "especially if you're gonna be driving." (ALYX 57(a), p. 4) Blachut expressed to complainant his opinion that some people take medication but don't realize its effect. (ALYX 57(a), p. 8) Complainant's surreptitious recording of the conversation does not show Blachut to be accusatory in raising the issue. The matter was not documented and no entry was made in complainant's personnel file.

Perjorative Comments

Complainant alleges that he suffered harassment through pejorative comments that reflected scorn and hostility. Specifically he refers to comments by James Johnson, a project engineering manager for Alyeska, and Mike Cusick, a quality generalist for Alyeska.

Johnson testified that at the end of a staff meeting of managers on August 11 or 12, 1993, he stated that he understood that three more whistleblowers had come forward. When someone at the meeting asked if one of the whistleblowers was complainant, Johnson answered that he understood that complainant's name was mentioned by a newspaper article. Johnson testified that he did not refer to complainant in a derogatory manner. (Tr. 1265) Subsequently, Johnson learned from Ombudsman Wood that the complainant was concerned about his name coming up at the staff meeting. Johnson along with Wood attempted to alleviate any misunderstanding by meeting with complainant. However, even though multiple meetings were scheduled, including face to face and telephone conference, none were ever held as complainant declined to speak to Johnson. (Tr. 1260-67, 568-9) The incident does not reflect an intent to harass complainant.

Complainant testified that at a birthday party in May of 1993, Mike Cusick, a quality generalist at Alyeska, said to him, "be careful, I may need a scum bag inspector in the Fairbanks area and I may lose your phone number." (Tr. 444) Complainant understood these remarks as a threat; that Cusick might have control over his employment in the future, and if complainant's services were needed, he might lose complainant's phone number. (Tr. 443-45) Cusick testified that he did not direct the term at complainant, and that although he at times used the term "scum bag contractor" in jest, he never used it in the context of threatening someone's employment. (Tr. 1598-99) Cusick had no role with Alyeska that would have permitted him to affect complainant's employment status. (Tr. 1597) Cusick was called to the office of Ombudsman Woods in the spring of 1993 to discuss

his use of the words. He agreed with Woods that use of the term was inappropriate in that it was offensive to some people. (Tr. 1599) Cusick was admonished by Newcomer for using the term, and was told that if there was a next time, he would be subject to disciplinary action. (Tr. 1142) Both Cusick and Newcomer testified that the term was not intended to be derogatory toward inspectors, but rather to portray contractor employees negatively relative to their permanent counterparts.

Complainant has not sustained his burden in showing that he suffered adverse actions in the form of harassment, intimidation or working conditions.

MOTIVATION FOR TERMINATION

Complainant has shown that he engaged in protected activity and that he suffered adverse employment action when he was laid off and later fired. Complainant must, to establish a prima facie case, present evidence to raise the inference that the protected activity was the likely reason for the adverse actions. Dean Dartey v. Zach Company of Chicago, Case No. 82-ERA-2, (Sec'y, April 25, 1983). Stack v. Preston Trucking Co., Case No. 86-STA-22, (Sec'y, Feb. 26, 1987) and Haubold v. Grand Island Express Inc., Case No. 90-STA-10, (Sec'y, April 27, 1990).

The temporal proximity of the adverse actions to the protected activity is sufficient in itself to raise the inference that the protected activity was the reason for the adverse actions. The Court of Appeals in Couty v. Dole, 886 F.2d 147 (8th Cir. 1989) held that the temporal proximity of "roughly thirty days" is sufficient as a matter of law to establish an inference of retaliatory motivation. See also the Secretary's decision in Goldstein v. Ebasco Contractors Inc., Case No. 86-ERA-36, (Sec'y, April 7, 1992).

Here, complainant sent a letter to Alyeska President Prichard on August 16, 1993 stating: "I am being subject to unfair/unequal treatment, unreasonable and intolerable working conditions and ostracized by my supervisor and peers because of my perseverance and dedication to inform Alyeska of possible Noncompliance problems." (CX 159) Complainant also met with Newcomer, Wood, and Swink on July 28, 1993 and expressed concerns about the continued use of unqualified inspectors, frustration with notes sent to persons not in compliance, and environmental concerns he had previously raised. (CX 389 at AAS 00044) The temporal proximity of these and other communications constituting protected activity to the adverse actions is sufficient in itself to raise the inference that the protected activity was the reason for the adverse actions.

RESPONDENTS' REASONS FOR TERMINATION

As the complainant has established a prima facie case, respondents have the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the respondents bear only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the complainant. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981). Dartey v. Zack Company of Chicago, Case No. 82-ERA-2, (Sec'y, April 25, 1983).

Respondents contend that complainant was laid off and terminated from employment for legitimate non-discriminatory reasons.

Lay Off

Complainant went on sick leave from August 20, 1993 until October 21, 1993 because of asthma and lung infections. (Tr. 461, 468, 741) He was laid off by ASIS effective October 29, 1993. The record is unclear about whether the complainant had returned to work from his sick leave when he was laid off as Larson testified that she understood the complainant to be on medical leave when he was laid off. (Tr. 348) Respondents assert that the complainant was laid off because of a seasonal lack of work. (Tr. 347) Swink testified that there was no inspection work for complainant other than inspection of MCTs, and complainant had informed him that he no longer wished to do inspection work that involved going inside MCTs because of his respiratory problems. (Tr. 467-468, 890) When ASIS laid off complainant, ASIS' expectations were that complainant would be recalled when work became available. (Tr. 1612-13, 749-51; ASISX 45)

Respondents explained that it is normal practice for inspection services to lay off inspectors during the winter months when construction becomes difficult because of the cold. Swink testified that although some inspectors work year around, close to half are laid off during the winter months. In 1993, about 80 or 90 inspectors worked during the summer peak construction period but their numbers dropped to around 30 or 40 during the winter months. (Tr. 749, 1635-37, ASISX 80) Rodney D. Mitchell, a business inspection coordinator for ASIS, testified that as work winds down in the late fall, and no work is foreseen for some individuals they are put on layoff status. (Tr. 1290)

Termination

Complainant's employment was terminated by ASIS on December 10, 1993. Swink was the ASIS official responsible for the firing. (Tr. 765-66) He processed the termination in concert with Larson of Human Resources. (Tr. 1369-70) Swink, Larson and Conrad Bagne, Chief Administrative Officer for ASRC, testified that complainant's employment was terminated because he failed to do his job.

According to Alyeska, complainant's difficulties with performing his work goes back at least to February, 1993, when he was promoted to the position of Quality Specialist. Blachut, Supervisor of Inspections for Alyeska, testified that he needed someone to act in the position of Quality Specialist when the person who had held the position, Gene Nunn, left in early, 1993. The Quality Specialist's duties involved assisting Blachut in handling all the baseline inspection programs including the MCT inspection program. Blachut testified that he offered complainant the position because Nunn had a high regard for complainant's knowledge of the MCTs and the requirements of the program. (Tr. 962-3)

The Quality Specialist position was based in Alyeska's offices in Anchorage. (Tr. 966) Complainant was assigned the responsibility of coordinating the MCT inspection program as well as other baseline programs² for a wide range of equipment on the pipeline such as cranes, plenums, pressure safety vessels and fork tines. (Tr. 420, 573-75) The position included significant responsibilities with paperwork and documentation of inspections. (Tr. 967) Blachut testified that in April, 1993, complainant was having problems in keeping up with the paper work. (Tr. 971-72) To assist complainant, Blachut asked him if responsibility for some of the baseline programs could be assigned to others. At a follow up meeting on April 13, 1993, all of complainant's administrative responsibilities except for the MCT inspection program were transferred to other inspectors. Also, complainant was to transfer his office back to Fairbanks starting May 1, 1993. (Tr. 968-69; ALYX 22) Spring was the time when inspection of the MCTs would accelerate because of the oncoming warm weather.

By early June, complainant was doing MCT inspection work. (Tr. 601) However, his paperwork responsibilities continued to be deficient. In an e-mail message dated June 9, 1993, Blachut cautioned complainant:

You are seriously behind on your paperwork and need to get caught up. Extra help was provided in Fairbanks

²Baseline or periodic inspections are those that are repetitive in nature as they re-occur on a periodic, i.e. monthly or yearly basis. (Tr. 1370)

and I have yet to see a single report on the tankers you say are completed. I want a status of all of these on my desk by 4:00 today and we will discuss this tomorrow.

(ALYX 33)

As alluded to by the June 9, 1993 e-mail transmission, complainant requested and was provided the assistance of an additional inspector in early June, Williams Hawkins. (Tr. 584-85, 1336-37; ALYX 30, 31) Hawkins worked on completing the MCT field inspections while complainant was working on "putting the whole thing together..." (Tr. 1339-40) Nevertheless, complainant was still having difficulties completing his paperwork requirements in July. On July 12, Blachut implored by e-mail: "I still have not received the information on which, if any, tankers are not in compliance with our inspection program." (ALYX 45) Continuing efforts by Blachut to obtain the necessary inspection documentation from complainant were futile. (Tr. 590-98, 980-85)

Blachut explained his concerns of not having the correct inspection documents on hand. He testified that regulatory agencies audit Alyeska many times unannounced, and if the required inspection documents are not on hand to prove the inspection occurred, the MCTs would have to be taken out of service or the company would be subject to a fine for operating an uninspected tanker. (Tr. 980-81) The tankers must not only be inspected in a correct manner, but the inspections must be promptly and properly documented. (Tr. 1390-91)

The contract between Alyeska and ASIS whereby ASIS provides inspection services to Alyeska on a full service basis took effect on July 1, 1993. (ALYX 44) At the end of July 1993, Alyeska moved Jim Kingrea from its project division to the quality division to monitor ASIS' compliance with the contract. (Tr. 1371) His responsibility was to ensure that ASIS was performing the way it should, doing the inspections that were required, and providing the finished product, that is, the documentation showing the inspections had been done. (Tr. 1382) Kingrea testified that his review prompted two conclusions, first, that the inspection program was federally mandated and the Department of Transportation was "pretty serious" about it, and second, that the files were very incomplete and disorganized to the extent that he could not tell the inspection status of the equipment. (Tr. 1383) Kingrea emphasized that he was not focusing on the work of any one individual, but on the program. (Tr. 1396)

Kingrea contacted complainant for information concerning the status of the MCT inspection program. Kingrea found complainant

to be extremely cautious and very elusive. Complainant would give only partial answers to questions. Kingrea would have to ask two or three times to get the complete answer. He found numerous gaps in the inspection documentation of the MCTs. For example, he received status reports stating that specific tankers were road-worthy and had been returned to service after inspection. However, on a review of the files he found, in a number of cases, that although the tanker was on the road there wasn't anything to show it had been inspected. (Tr. 1395-97) Kingrea was unable to get complainant to meet with him to discuss the MCT program. He testified that complainant always seemed to have something else to do. (Tr. 1410-11, 1398-99) When Kingrea complained to Blachut that he was having difficulty getting reports from complainant, Blachut suggested Kingrea look in complainant's office. (Tr. 1397) Kingrea's search retrieved numerous documents that pertained to the MCTs, but enough substantial gaps remained that he asked Aaron Miller, the inspection coordinator for ASIS, to do a complete review of all the files to determine the compliance status of all the tankers. (Tr. 1398)

Aaron Miller was given the position of inspection coordinator for ASIS about the middle of August, 1993. (Tr. 1391) Kingrea asked Miller to review the inspection documentation, and on behalf of ASIS, to inform him on its completeness. (Tr. 1396) Miller conducted a review through the month of September of the MCT inspection program. His review discovered that ASIS had inspected forty-two MCTs since June but as of September 13, 1993 ASIS had not transmitted documentation to Alyeska for twenty-four of those tankers. (ALYX 92, 95; Tr. 1421-23) Kingrea testified that the performance standard for length of time to produce inspection documentation for Alyeska after an inspection is two weeks or less. (Tr. 1451) Complainant testified that an inspection report should be finished in two or three weeks. (Tr. 452-53)

In a letter dated September 14, 1993, Steven Newcomer, manager of Quality Services for Alyeska, informed ASIS General Manager Swink of ASIS that Alyeska was uncertain of the compliance status of the twenty-four MCTs and if Alyeska did not receive the applicable inspection reports by September 21, 1996, it would be forced to clean and re-inspect all twenty-four. (ALYX 95)

On September 24, 1993, Miller advised Alyeska's Kingrea that there were no current inspection reports on file with respect to at least nine of the MCTs listed on complainant's August 14, 1993 status report as having been inspected and returned to service. (ALYX 98; Tr. 1425-27)

Kingrea subsequently determined in discussions with a DOT representative that Alyeska's inspection program included a

number of tankers that were not required to be inspected under DOT regulations. (Tr. 1427-28; CX 206) Those tankers were withdrawn from the list of tankers without inspection reports. Alyeska continued to press Swink on the necessity of ASIS producing the missing inspection reports on the remaining tankers or accepting responsibility for the cost of cleaning and re-inspection. (ALYX 102) Alyeska also advised ASIS that the cleaning needed to commence by October 11, 1993 because of the oncoming cold winter weather or the tankers would have to be taken out of service. (Tr. 1434-36; ALYX 102) On November 1, 1993 Miller informed Kingrea that he found three more tankers purportedly inspected by complainant but lacking the appropriate inspection documentation. (ALYX 114; Tr. 1447-52) As it was too late into the cold weather season to clean and inspect the tankers, two of them were removed from service and replaced with two other MCTs that were in storage. (Tr. 1461-63; ALYX 120, 166)

Swink continued to press complainant for the missing inspection reports and documentation after complainant was placed on lay-off status. (Tr. 751)

The inability of ASIS to provide proper documentation to Alyeska on MCTs resulted in the cleaning and reinspection of four tankers at a cost of over \$30,000 and the removal from service of two additional tankers. (ALYX 158, 483)

ASIS also had a continual problem in not being able to obtain time sheets from complainant. Original time sheets were needed by ASIS management so that they could be paid for the time worked by their inspectors. (Tr. 752-53; ASISX 18, 42, 43, 44)

Human Resource Manager Larson traveled from Anchorage to Fairbanks on November 23, 1996 to meet with complainant and explain that he would continue to be designated as on lay-off subject to recall status rather than have his employment terminated only if he could provide missing documentation such as the inspection reports and time sheets. (Tr. 1613-18) During the meeting Larson presented to complainant a memorandum dated November 22, 1993 which was intended to put complainant on notice that if he did not submit the documentation identified by the memo his employment would be terminated. A date for turning in the inspection reports was also agreed upon. The memo identified the items needed to be completed as:

1. All exit procedures must be completed with Billy Carver and LoAnn Larson on Tuesday, November 23, 1993.

2. All outstanding expense reports must be completed and originals provided to ASIS. Specifically, expense report(s) to cover an advance of \$811.65 is outstanding and an expense report(s) for the Cargo Tank class held on week ending 10-31-93.

3. Original time sheets for the following week ending dates:

7-18-93	7-25-93	8-8-93	8-22-93
8-29-93	9-5-93	9-12-93	9-26-93
10-10-93	10-17-93	10-24-93	10-31-93

4. Reports on mobile cargo tanker inspections that were incomplete and sent back from ASIS for completion. These reports are to be completed and returned by December 3, 1993.

5. The ASIS hire packet must be signed for record. This packet was provided to you for review and signature but never returned. The ASIS Hire Packet contains information on various ASIS personnel policies and procedures. The Hire Packet contains a signature page which must be completed for our files. (Emphasis in original)

(ASISX 45)

Complainant turned in to Larson all but two of the time sheets at the November 23, 1993 meeting.

By letter from Swink dated December 10, 1993, ASIS informed complainant that his employment was terminated effective that date. The letter referenced the November 22 lay off processing memo which forewarned complainant that his job would be terminated if he did not provide named items by December 3, 1996, and explained that although some of those items were provided at a December 3 meeting, others including "[t]he reports on mobile tanker inspections still contained incomplete information. Specifically, no ISM's were completed for any tankers and at least three leak tests were not included." (ASISX 57)

Swink testified that when it came down to the very end, he saw no other choice but to fire complainant. All during the fall he had many discussions with the complainant by telephone and face to face wherein complainant would assure that the paperwork would be forth coming, but that on 99% of the time he did not receive the promised paperwork. (Tr. 765-66)

Respondents have satisfied their burden of producing evidence showing a legitimate, non-retaliatory reason for the complainant's lay-off and termination. ASIS has met its burden of production by showing that complainant was laid off because of a seasonal lack of work and by showing that complainant's job was terminated because he failed to meet his job responsibilities for producing essential quality control inspection documentation and that such failure caused his employer difficulty with its principal customer. Alyeska has shown that the pressure it exerted on ASIS to provide the MCT inspection documents for which it had contracted and paid was legitimate and non-retaliatory,

notwithstanding that the consequence of that pressure was to cause ASIS to demand that complainant supply the inspection documentation for which he was responsible.

COMPLAINANT'S ARGUMENT THAT REASONS ARE PRETEXTURAL

Once a respondent satisfies its burden of production, the complainant then may establish that the respondent's proffered reason is not the true reason, either by showing that it is not worthy of belief or by showing that a discriminatory reason more likely motivated respondent. Shusterman v. EBASCO Services, Inc., Case No. 87-ERA-27, (Sec'y, Jan. 6, 1992).

Complainant argues that the aforesaid reasons proffered by respondents are pretextural, that they conceal their unlawful termination of complainant's employment because he engaged in protected activity.

Lay Off

Complainant contends that ASIS' argument that complainant was laid off because of the unavailability of work is not supported by the evidence. He points to Swink's testimony that there was plenty of MCT inspection work available and that it was possible to have divided the inspection duties so that complainant would not have to enter the tankers. Swink testified that he told complainant that there was tank inspection work available if he wanted to do it, but that complainant did not want to go into the tankers because of the possible effect on his respiratory condition. Swink then asked Robbie Robinson, Alyeska Operations Manager, to look into whether there were any other positions available. The response was that there were none. Swink testified on cross-examination that he did not give any consideration to having complainant do all the inspection work except for entering the tank because it would not be economical to have two inspectors do the work of one. Swink did agree that the MCT inspection work could be divided on a functional basis but that it would not be efficient from the standpoint of two inspectors documenting the inspection of one tanker. (Tr. 913-16)

Complainant's contention that his lay off was retaliatory is not accepted. Swink's testimony is credible. ASIS could have assigned work so that two inspectors would inspect each tanker. However, that does not mean that ASIS' inspection methodology was implemented or not modified to retaliate against complainant. Complainant's treatment was in accord with the seasonal variation in the industry in Alaska; close to half the employees go on layoff status during the winter months. (Tr. 750) Complainant's layoff was not shown to stem from a discriminatory motivation.

Complainant argues pretext in light of the layoff's timing being only nine days after an October 20, 1993 meeting between

complainant, Alyeska Ombudsman Wood and John Dayton, Senior Vice-President for Operations of Alyeska.³ Dayton testified that he had been assigned the task of answering complainant's concern by David Prichard. He called the meeting so he could meet face to face with complainant to hear his concerns first hand. (Tr. 223) The evidence shows nothing sinister or conspiratorial regarding the meeting. Dayton's contemporaneous notes of the meeting are consistent with his testimony of its purpose. (CX 224) Complainant also refers to a diary note authored by Dayton after discussions with Wood on July 29, 1993 wherein Dayton lists items involving complainant including a statement that ASIS will continue to watch complainant closely. (CX 410, p. 646) Dayton testified that this notation referred to a statement to him from Wood that ASIS would watch complainant after a July 23, 1993 incident wherein Blachut observed complainant slurring his words and projecting an uncharacteristically boisterous demeanor. Blachut inquired privately of complainant about whether he was taking medication and cautioned care when driving. (Tr. 1029-30; ALYX 56, 57 and 57A) Blachut's observation of complainant and his subsequent meeting was inconsequential except for an apparent resolution by ASIS to keep an eye out for similar mannerisms in the future. Neither the October 20 meeting or the notation of watching complainant are evidence of discriminatory treatment toward complainant. In fact, Dayton's meeting reflects an attempt to address complainant's concerns and Blachut's questions reflect a concern for complainant's well being.

Complainant also alleges that Susan D. Murto, corporate counsel for Alyeska, sought to covertly influence ASIS' layoff of complainant. Murto's involvement with this matter related to preparing a letter for Dayton's signature which responded to complainant's concerns, and to receiving a facsimile of the draft of the complainant's layoff notice from Larson. Murto testified that she did not know why Larson sent the draft to her, other than conjecture that someone at ASIS knew she was preparing Dayton's response to complainant and thought she might be interested. Murto explained her involvement with the layoff notice:

It was sent to me. I looked at it. It was like a for your information type of thing. I think we finally reached each other, I think and [Larson] just said that this is what we are going to do and I said thank you for the information.

(Tr. 326-27)

There is nothing in the record to show that Murto influenced the decision by ASIS to lay off complainant.

³Complainant's post-hearing brief, p. 36.

Complainant has not met his burden of showing that the reasons proffered by respondents for his lay off are pretextual and conceal a discriminatory motive.

Termination

Complainant argues that the record contains substantial evidence contradicting the reasons proffered by respondents for their termination of the complainant's employment.

Initially, complainant contends that one of the reasons stated in the termination notice for his firing, not turning in the tools, constitutes disparate treatment. However, Swink testified that he did not know whether complainant would have been fired if his only transgression was failing to return the tools. Swink was definite, however, that complainant's termination of employment was because of his continual failure to produce the required inspection reports.

With respect to the incomplete inspection reports, complainant argues that the respondents' review of those reports contain blatant mistakes and inconsistencies and therefore evidence a retaliatory motivation.

Swink received from Newcomer, Alyeska quality services manager, on October 7, 1993 a letter summarizing an earlier conversation wherein Newcomer explained that MCTs identified by the letter were past due the annual inspection and would have to be cleaned and reinspected if the inspection reports for them could not be found. Newcomer stressed that the cleaning would have to commence by October 11, and that Alyeska would open a separate account to capture the cost for back charges. (ALYX 102) Swink, in turn, followed with a letter to complainant stating that, "[a]s we have previously discussed by telephone on September 29, 1993 and October 6, 1993 and by way of a PROFS note on September 27, 1993, ASIS must have the inspection reports for the [identified] tankers no later than 8:00 a.m. on October 11, 1993." (Emphasis in original) Swink emphasized the urgency of the inspection reports by explaining that their absence by October 11 will require that the MCTs be re-inspected at ASIS' expense. (ASISX 30) Subsequently, complainant told Swink that he would turn in the inspection reports on October 13, 1993. (Tr. 747)

Complainant was instructed by Swink to turn the reports over to either Rusty Mitchell or Rusty Hammon, field inspection coordinators for ASIS. (ASISX 27; Tr. 1282-83, 1285) The inspection reports were accepted by Mitchell and forwarded to Swink, who turned them over to Alyeska. Alyeska reviewed the reports but found them to be unacceptable. (Tr. 748-49; ALYX 396) Newcomer detailed the deficiencies in a November 4, 1993 letter to Swink.

Complainant agreed at the November 23, 1993 exit processing meeting with Larson in Fairbanks to complete the inspection reports and return them on December 3, 1993. (ASISX 45; Tr. 1614-15) Swink asked Mitchell to meet with and accept from complainant the inspection reports and review them for completion and adequacy. Mitchell testified that he reviewed the documentation along with Miller. Their review revealed that some of the items characterized as deficient by Newcomer in his November 4, 1993 letter to Swink were in fact complete. (ASISX 78, p. 803) However, they found that other items continued to be deficient, including missing leak test reports and missing inspection summary memorandum ("ISM"). (Tr. 839; ASISX 57)

Mitchell's disagreement with some of Alyeska's findings of deficiencies with the inspection reports resubmitted by complainant on December 3, 1993 was not significant enough to show that Alyeska's demand on ASIS to provide the MCT inspection documents was motivated by was retaliation against complainant.

When Mitchell met with complainant on December 3, he "strongly encouraged" complainant to write and submit the missing ISMs because he considered it a relatively simple way to resolve the matter. (Tr. 1300) Complainant did not submit the ISMs. He argues that he did not submit the ISM documentation because it was not required at the time the inspection reports in question were completed.⁴ Complainant testified that he had inspected tanks from 1991 until his termination but knew of no requirement to do an ISM, because they were not required until late 1993. (Tr. 449) As support for his argument, complainant refers to the testimony of Chris Sopcak, a senior commercial analyst for Alyeska, who was a senior welding engineer in 1993, and Blachut.

The testimony of neither Sopcak nor Blachut supports complainant's argument. Sopcak testified that he was involved in producing the standard inspection procedure ("SIP") for the MCT program and that as of August, 1993, when he left the tanker program, a final document had not yet been created. (Tr. 278-82) However, on cross-examination Sopcak identified a SIP for cargo tanks that he had approved on October 12, 1993 and that had been approved by the Supervisor of Quality Engineering on August 12, 1993. (Tr. 290) The SIP required preparation of ISMs. (ALYX 172, p. 7)

Blachut, Alyeska's supervisor of Inspections, testified that IS-47, Alyeska's inspection manual, required the use of ISMs. He testified that when IS-47 became effective on April 15, 1993 all inspection personnel were instructed that ISMs should be filled out. (Tr. 1089-90; CX 289)

⁴Complainant's post-hearing brief, p. 41.

Other witnesses with knowledge of the MCT inspection program testified that they understood ISMs to be part of the inspection documentation. Paul Lott was called as a witness by complainant. He was employed by ASIS as the Vice President of Technical and Manager of Quality Assurance until May of 1994. (Tr. 86) Lott was charged by ASIS with evaluating Alyeska's position that ASIS should assume financial responsibility for re-inspection of those MCTs where complainant had not submitted the required inspection documentation, including ISMs. (Tr. 100) Lott's review found that Alyeska was correct; there were deficiencies in the inspection packages. (Tr. 101-02) Lott testified that one facet of his evaluation was whether ISMs were attached. (Tr. 116) He explained the need for ISMs:

The ISM is basically an inspection summary memorandum. It acts like a traveler sheet or a letter of transmittal that originally ...was designed to be like a letter of transmittal where you pull all of your quality records attached to it and then sign it off so the packet is complete and then turn it over...through a records transfer order...to Alyeska Pipeline. It goes into their files.

(Tr. 116)

Swink testified that he helped write the IS-47 when he was employed by Alyeska, and that the IS-47s became effective shortly after he left Alyeska and required the ISMs for complete inspections. (Tr. 841)

Mitchell, the coordinator of inspections for ASIS who met with complainant to obtain the missing inspection documentation, testified that ISMs were required for any inspections based on IS-47. (Tr. 1300-01) Hawkins, the inspector who was assigned for a period to assist complainant with inspections, testified that he did an ISM for every package, and that complainant showed him how to do it. (Tr. 1340-41) Kingrea testified that the ISM documentation was required in the MCT program. (Tr. 1380-81) Moreover, the inspection manual IS-47 itself, effective February 1, 1993 requires an ISM to be done. (CX 47)

Thus, the record is clear that complainant was required to complete the ISM as part of his inspection package. Complainant's refusal to complete the ISM is puzzling.

Finally, complainant argues that his termination was a consequence of him being targeted for adverse treatment by Blachut and Newcomer. As support he offers the following particulars: (1) Blachut offered him the quality control coordinator position only because Blachut wanted to keep an eye on him; (2) Blachut's criticism of complainant is inconsistent

with, and was undermined by, the testimony of Sopcak, who praised complainant's performance as an inspector and in helping draft SIPs; (3) Blachut condemned complainant for making a false statement about an imminent purge in Alyeska's quality department only four days after complainant sent Blachut an E-mail message complaining about unqualified inspectors; (4) The timing of complainant's inspection reports suddenly being deemed missing after complainant wrote to Prichard in August, 1993, and of Alyeska escalating its demands for complainant to be held accountable for reinspection of the tankers as complainant escalated his demands to Prichard; (5) Alyeska continued to seek paperwork from ASIS even when knowledgeable that the missing paperwork pertained to tankers withdrawn from the inspection program in September, 1993, and even when complainant was on medical leave; (6) Blachut knew there were problems with the inspection paperwork, but he was hiding behind complainant to himself escape blame; (8) Blachut and Newcomer were eager to find a scapegoat for the deficiencies in the quality control program; without the mistakes they falsely attributed to complainant, he would not have been fired.⁵

Complainant's argument that Blachut requested him to take the quality coordinator position so that Blachut could keep an eye on him can not be reconciled with the record. Complainant acknowledges that the position was a promotion. (Tr. 556) Blachut testified that complainant was the first person who came to mind because the prior coordinator, Nunn, had a high regard for complainant's knowledge of MCTs and the requirements of the program, and although Blachut needed assistance in handling all the inspection programs, the MCT program was the focus of most attention. (Tr. 962-63) For Blachut to award a position so critical to his success to an inspector merely to keep an eye on him would be irrational. Complainant's apprehension apparently had its genesis in a conversation that Blachut had with Robinson. A concern that Blachut had in offering the position to complainant stemmed from problems Robinson had experienced in the past with complainant completing time sheets and expense reports on time. Blachut discussed the matter with Robinson. They decided that the problem was probably one of management as inspectors were working with no direct supervision in Fairbanks, and thus the problem could be rectified by complainant being close to Ocean Tech and Alyeska supervision in Anchorage. (Tr. 962-63) Blachut's offering the quality coordinator position to complainant does not evidence adverse treatment.

The testimony of Sopcak does not undermine the criticism of complainant. Sopcak worked with complainant as a welding engineer. Complainant would conduct an inspection on the tanker and provide the resulting information to Sopcak as the engineer

⁵Complainant's post-hearing brief, pp. 42-47.

so Sopcak could make judgements on how to dispense with any problems. (Tr. 272-73) Sopcak testified that he found complainant to be very helpful and technically competent. However, complainant's technical competence is not at issue. The criticism regards complainant's inability or refusal to turn in completed inspection reports.

Complainant's assertion that Blachut scheduled the meeting with McGrew as an act of retaliation for complainant sending an E-mail to Blachut complaining about Alyeska's operation is contrary to the record. Initially, Blachut was not responsible for setting up the meeting. McGrew asked for a face to face meeting with complainant, and Newcomer took the lead in scheduling it. (Tr. 1061) Blachut's role was to determine the source of complainant's information and to find out if McGrew had actually made the statement. (Tr. 1015-18) Blachut could not have predicted that the meeting would end in such turmoil. Moreover, the E-mail message that complainant contends prompted the retaliation was not sent until after the McGrew meeting.⁶

Complainant argues that there was a causative relationship between his August, 1993 letter to Prichard and his inspection reports being "suddenly deemed missing." However, complainant's problems with missing documentation did not suddenly occur in August of 1993. Complainant's difficulties with completion of his inspection reports are chronicled as far back as February, 1993. (Tr. 971-72) Complainant was cautioned by E-mail transmitted by Blachut on June 9 that he was seriously behind in his paperwork. (ALYX 33) Moreover, it was not Blachut who discovered the missing inspection reports but Kingrea. Kingrea testified that he found the inspection documentation to be very incomplete and disorganized. Kingrea asked Aaron Miller, the inspection coordinator for ASIS, to determine the inspection compliance status of all the tankers. (Tr. 1398) Miller's review discovered that ASIS had inspected forty-two MCTs since June but as of September 13, 1993 ASIS had not transmitted documentation to Alyeska for twenty-four of those tankers. (ALYX 92, 95; Tr. 1421-23) Thus, the record does not support complainant's assertion that Alyeska's expressed concern to ASIS about missing documentation on 24 tankers inspected by complainant was prompted by complainant's letter to Prichard or any other complaints by complainant.

Complainant is correct that Alyeska continued to seek paperwork from ASIS even after Alyeska knew that the missing paperwork pertained to tankers withdrawn from the inspection program. Kingrea testified that the reason Alyeska sought to obtain from ASIS the missing inspection documentation on these

⁶The meeting with McGrew and complainant's E-mail transmission both took place on July 20, 1993. The meeting was at 10:30 and the E-mail transmission was posted at 11:59 a.m.

tankers was because Alyeska had paid ASIS to inspect the tankers and such documentation would verify that the equipment was safe and would otherwise enhance its value. (Tr. 1430-32)

Complainant's physical condition while he was on medical leave from August 20 until the third week of October, 1993 because of respiratory problems did not prevent him from doing other work such as completing the inspection documentation. Complainant reported working a total of 168 hours from the week ending August 23 through the week ending October 23, 1993. The work involved providing documentation for the inspections he performed in the spring and summer of 1993. (Tr. 604-11; ALYX 116) Neither Alyeska's demands for the inspection documentation from tankers withdrawn from service nor the requests from complainant that he complete the paperwork while on medical leave evidence retaliatory conduct by respondents.

Complainant also alleges that he was made a scapegoat by Blachut and Newcomer for the inadequacies of their own performance in quality control. However, the evidence supports the finding that complainant was fired because he could not be counted on to complete the inspection documentation required by his job as an inspector. There is no support for his argument that he was a scapegoat. The testimony of Swink on the reason complainant lost his job is credited:

...all during the fall...I would be assured that paperwork or dates would be given to me and on many different occasions, I would say 99% of the time, I did not receive any dates. I did not receive paperwork that was promised to me. And I continued on that way and when it came down to the very last, I saw no other choice, even after giving an extension to the time frame to have data in to me, but to terminate him. It was an ongoing problem, it was not something that just happened once or twice."

(Tr. 765-66)

Complainant has failed to prove that the actions of ASIS or Alyeska including those resulting in his lay off or termination were motivated by a retaliatory intent toward him.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT the December 6, 1993 complaint of Richardo Acord be dismissed.

THOMAS M. BURKE
Administrative Law Judge

TMB:mr

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. The Administrative Review Board was delegated jurisdiction by Secretary's Order dated April 17, 1996 to issue final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 61 Fed. Reg. 19978 (1996).

